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21 *Bard Peripheral Vascular, Inc.*

22 || UNITED STATES DISTRICT COURT

23 || DISTRICT OF ARIZONA

24 In Re Bard IVC Filters Products Liability
25 Litigation

No. MD-15-02641-PHX-DGC

**PARTIES' JOINT SUBMISSION RE
SCHEDULE RELATING TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT RE
PREEMPTION**

1 In accordance with Case Management Order No. 23 [Doc. 5770], the Parties make
 2 this joint submission regarding the schedule relating to the discovery, expert disclosure,
 3 and response to Defendants' Motion for Summary Judgment Regarding Preemption [Doc.
 4 5396] and the schedule for briefing on Defendants' Motion and Incorporated
 5 Memorandum to Seal [Doc. 5397].

6 The Parties are in disagreement as to whether Defendants should be permitted to
 7 disclose supplemental expert opinions in support of their motion for summary judgment as
 8 part of the schedule for Plaintiffs' response to that motion. The Parties' respective
 9 positions on that issue are set forth in Section I below. The Parties' respective proposed
 10 schedules relating to the discovery, expert disclosure, and response to Defendants' motion
 11 for summary judgment are set forth in Section II below.

12 With respect to the Motion to Seal, the Parties have agreed on a schedule as set
 13 forth in Section III below.

14 **I. Dispute Regarding Defendants' Right to Disclose Expert Testimony on
 15 Preemption**

16 The Parties dispute whether Defendants have the right or should be allowed, at this
 17 juncture, to disclose supplemental expert opinions regarding the preemption issues raised
 18 in their summary judgment motion. The Parties' respective positions are set forth in the
 19 following matrix:

Plaintiffs' Position	Defendants' Position
20 Plaintiffs oppose Bard's attempt to 21 supplement Defendants' motion for 22 summary judgment through new expert 23 disclosure at this stage for three reasons. 24 First, the discovery and expert 25 disclosure that this Court allowed in CMO 26 was as a result of Plaintiffs' request 27 pursuant to Rule 56(d) to take additional 28 discovery and to make expert disclosures to respond to Defendants' motion. This Court granted that request and allowed Plaintiffs to take discovery and make expert disclosure for the purpose of responding to the motion. Simply, there nothing in Rule 56(d) or this Court's order that permits Defendants to make supplemental expert disclosures.	The Defendants submit that the Plaintiffs' argument is premature. They are seeking to categorically bar the Defendants from submitting any responsive expert testimony in conjunction with the motion for summary judgment on preemption, before either the Court or the Defendants have the opportunity to see what type of expert opinion the Plaintiffs will submit themselves. It is true, as the Plaintiffs note, that Bard has advised the Court from the outset that it did not intend to rely on expert opinion testimony in support of its motion for summary judgment. It is also true that the motion filed by the Defendants in fact did <u>not</u> rely on expert opinions. That is

1 Second, it would be inherently unfair to
 2 permit Defendants to bring out new
 3 testimony in support of their motion after
 4 filing it. Defendants already filed an 818
 5 paragraph statement of facts (SOF) in
 6 support of their motion. [Doc. 5398.]
 7 That document lays out the facts on which
 8 Defendants rely for their motion, and it is
 9 that document to which Plaintiffs must
 10 respond in opposition to the motion.
 11 Anything that Defendants' experts
 12 disclose would necessarily be new
 13 evidence not included in the motion or
 14 filed SOF. There is simply no basis for
 15 Defendants to add new evidence now.

16 Third, at the February 17 Case
 17 Management Conference, Bard expressly
 18 disclaimed that it would rely on expert
 19 testimony in support of the motion. After
 20 Plaintiffs raised their need to be able to
 21 utilize expert testimony to respond to
 22 Defendants' anticipated motion, this Court
 23 directly asked defense counsel, "Mr.
 24 North, are you going to rely on experts at
 25 all in this presentation?" (Emphasis
 26 added.) Defense counsel responded:
 27 "Your Honor, we are not ... We
 28 understand their contention that they need
 29 expert testimony. We personally don't
 30 believe that is necessary, but one thing we
 31 were talking about ourselves is we're not
 32 afraid to put our cards on the table, we can
 33 go on and file this motion if the Court
 34 permits it, and then give them two weeks
 35 to look at it and tell us if they need time to
 36 do expert rebuttal." Thus, Defendants
 37 knew Plaintiffs intended to disclose expert
 38 testimony in response to the motion and
 39 expressly disclaimed to this Court that
 40 they would need any.

41 because, in the Defendants' view, expert
 42 testimony is not probative evidence on the
 43 legal question of preemption. *See Steele v.*
44 Depuy Orthopaedics, Inc., 295 F. Supp.
 45 2d 439, 446 (D.N.J. 2003) (rejecting
 46 expert testimony because "whether the
 47 FDA's approval of a [device] imposes
 48 requirements on a particular device is a
 49 question of law to be determined by the
 50 Court").

51 Bard continues to believe expert
 52 testimony is not probative on the issue of
 53 preemption in these cases. For that
 54 reason, Bard believes it is very unlikely
 55 that it will submit any expert evidence in
 56 response to the plaintiffs' supplemental
 57 disclosures. However, at this early
 58 juncture and without even seeing the sort
 59 of expert opinions the plaintiffs are going
 60 to offer, it is impossible to definitively
 61 determine the need or appropriateness of
 62 responsive expert opinions in such a
 63 theoretical vacuum. Bard has therefore
 64 proposed a schedule that merely adds one
 65 additional week to the schedule proposed
 66 by the Plaintiffs to accommodate the
 67 possibility that the Plaintiffs' disclosures
 68 may warrant the submission of
 69 supplemental reports from Bard's own
 70 regulatory experts.

71 The Defendants submit that building
 72 one additional week into the schedule
 73 devised by the Plaintiffs will not cause
 74 any prejudice. In the unlikely event that
 75 Bard does submit supplemental expert
 76 opinion related to the preemption issue,
 77 and if the Plaintiffs believe that the
 78 submission or any reliance on it is
 79 inappropriate, they would certainly be
 80 able to raise the issue at that time.

81 For now, however, Bard believes that
 82 the categorical prohibition sought by the
 83 Plaintiffs is premature.

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1 **II. Proposed Schedules on Summary Judgment Motion**

2 Depending upon how the Court resolves the above dispute, the parties' proposed
 3 schedules relating to the discovery, expert disclosure, and response to Defendants' motion
 4 for summary judgment are as follows:

5 A. Plaintiffs' Proposed Schedule

Date	Event
June 16	Deadline to complete depositions of John Van Vleet and Rob Carr (Those depositions have been scheduled for June 6 th and June 16 th .)
July 14	Plaintiffs' supplemental expert reports re preemption issues due
August 4	Deadline to depose experts re preemption issues
August 25	Plaintiffs response to Bard's motion for summary judgment
Sept. 15	Defendants' reply, if any, in support of motion for summary judgment

13 B. Defendants' Proposed Schedule

Date	Event
June 16	Deadline to complete depositions of John Van Vleet and Rob Carr (Those depositions have been scheduled for June 6 th and June 16 th .)
July 14	Plaintiffs' supplemental expert reports re preemption issues due
July 28	Defendants' supplement expert reports (if any) re preemption issues due
August 11	Deadline to depose experts re preemption issues
Sept. 1	Plaintiffs response to Bard's motion for summary judgment
Sept. 22	Defendants' reply, if any, in support of motion for summary judgment

23 **III. Motion to Seal Briefing Schedule**

24 The Parties have agreed on the following schedule for briefing on Defendants'
 25 motion to seal:

Date	Event
May 18	Defendants produce to Plaintiffs amended list to exclude Phillips exhibits and testimony not marked confidential

1	June 2	Defendants produce to Plaintiffs amended list to exclude all publicly
2		available documents
3	June 23	Deadline for parties to meet and confer regarding the issues raised by
4		the motion to seal
5	June 30	Deadline for Defendants to file an amended motion to seal (noting issues
6		resolved by the parties by agreement)
7	July 31	Deadline for Plaintiffs to respond to amended motion to seal
8	Aug. 22	Deadline for Defendants to file any reply brief supporting the amended
9		motion to seal

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11 RESPECTFULLY SUBMITTED this 12th day of May 2017

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1 **Certificate of Service**

2 I hereby certify that on this 12th day of May, 2017, I electronically transmitted the
3 attached document to the Clerk's Office using the CM/ECF System for filing and
4 transmittal of a Notice of Electronic Filing.

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7 */s/Deborah Yanazzo*
8 Deborah Yanazzo
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